# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 1 |
| Statutory provisions involved | 2 |
| Statement | 3 |
| Argument | 6 |
| Conclusion | 12 |


## CITATIONS


Cases:

| | |
|---|---|
| *Amaya* v. *United States*, 247 F. 2d 947, certiorari denied, 355 U.S. 916 | 7 |
| *Green* v. *United States*, 259 F. 2d 180, certiorari denied, 359 U.S. 917 | 7 |
| *Miranda* v. *Arizona*, 384 U.S. 430 | 6 |
| *Sibron* v. *New York*, 392 U.S. 40 | 8 |
| *Taylor* v. *Fine*, 115 F. Supp. 68 | 7 |
| *Terry* v. *Ohio*, 392 U.S. 1 | 8 |
| *United States* v. *Montez-Hernandez*, 291 F. Supp. 712 | 7 |
| *Wong Sun* v. *United States*, 371 U.S. 471 | 6, 7 |
| *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 | 10 |

Statutes:

| | |
|---|---|
| Immigration and Nationality Act, as amended: | |
| Section 106(a)(8) (8 U.S.C. 1105a(a)(8)) | 3 |
| Section 212(a)(17) (8 U.S.C. 1182(a)(17)) | 2, 10, 11 |
| Section 241(a)(1) (8 U.S.C. 1251(a)(1)) | 3 |
| Section 241(a)(2) (8 U.S.C. 1251(a)(2)) | 11 |
| Section 287 (8 U.S.C. 1357) | 9 |
| Section 287(a)(1) (8 U.S.C. 1357(a)(1)) | 2, 7 |
| Section 287(a)(2) (8 U.S.C. 1357(a)(2)) | 2, 9 |
| Section 291 (8 U.S.C. 1361) | 10 |




361-666—69——1

Miscellaneous:

1 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed.) § 5.2b (1968 Cum. Supp.) ---------- 6

# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 78

YAM SANG KWAI, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 411 F. 2d 683.

### JURISDICTION

The judgment of the court of appeals was entered February 17, 1969. The petition for certiorari was filed April 1, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the interrogation of an alien at his place of business by immigration officers, in the circumstances of this case, constituted an illegal arrest and

required the exclusion from evidence at deportation proceedings of an affidavit he voluntarily made during a subsequent interrogation, after he had been fully warned of his rights.

### STATUTORY PROVISIONS INVOLVED

Section 287 of the Immigration and Nationality Act, 8 U.S.C. 1357, provides in part:

> SEC. 287. (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

Section 212(a)(17) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(17), provides for exclusion from the United States of:

> Aliens who have been arrested and deported, or who have fallen into distress and have been

> removed pursuant to this or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 242 (b), unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission;

Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), provides for the deportation of any alien who:

> at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

## STATEMENT

Petitioner, a Chinese national, was first arrested and deported from the United States in 1965, at Honolulu, Hawaii. Thereafter he returned to the United States, and sought shore leave as a crewman at Philadelphia, Pa., on September 20, 1966. He was denied permission to land but nevertheless jumped ship and has been in the United States illegally ever since (Pet. 39, 43).[1]

On October 12, 1967, four immigration officers went to petitioner's restaurant on H Street, N.E., in Washington, D.C., to check the immigration status of any

[1] "Pet." references are to the petition for certiorari. "Tr." references are to the certified administrative record, filed with the court of appeals pursuant to Section 106(a)(8) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(8), and now lodged with the Clerk of this Court.

persons who might be employed there. This was a routine inquiry, made without specific knowledge or information that illegal aliens were employed there, although it is frequently the case that aliens obtain such employment. Two of the officers went to the rear of the restaurant; two went to the front of the restaurant, one remaining outside while the other entered (Tr. 5–6).

The officer encountered petitioner in the restaurant and sought to interrogate him as to identity and status. Petitioner, who was unable to speak English, sent for a friend to interpret for him. While they waited for the friend to arrive, petitioner continued to work at the restaurant, serving customers as they appeared (Tr. 7). When the friend came, the interrogation continued. Petitioner then produced two documents. One was the warrant of arrest against him in the prior deportation proceedings. The other was an order of supervision (a document applicable to an alien whose deportation has been ordered) in the name of another person. At this point, the investigator asked petitioner to close his restaurant and accompany him to the immigration office so that further inquiry concerning his status could be conducted. The officer later testified that he concluded, on the basis of the conflicting documents, that petitioner was possibly an illegal immigrant who might abscond (Tr. 9–11).

Petitioner and his friend went with the immigration officers to their office. There he was fully warned of his right to remain silent and to counsel, and then signed an affidavit admitting his prior deportation and his unlawful reentry to the United States after having

been denied shore leave (Pet. 46–47). A warrant of arrest and an order to show cause in deportation proceedings were immediately served upon him (Tr. Exh. 1).

Shortly thereafter a hearing was conducted before a special inquiry officer. Petitioner was represented by counsel and, on his advice, remained mute (Tr. 2). The government trial attorney offered in evidence petitioner's affidavit admitting his deportability. Petitioner's objection that the affidavit was the product of an illegal arrest was overruled and the affidavit was received in evidence as Exhibit 2 (Pet. 44). Also received in evidence, as Exhibits 3 and 4, were the immigration files relating to petitioner, which showed his prior deportation and the subsequent refusal of shore leave at Philadelphia, Pa., and a Hong Kong Seaman's Identity Book in his name, issued January 5, 1966 (Tr. 17–21; Pet. 40–41).

The special inquiry officer found petitioner deportable as an alien who had entered the United States in violation of law (Pet. App. D). The order of deportation was affirmed by the Board of Immigration Appeals on March 19, 1968 (Pet. App. C). Petitioner then sought judicial review in the United States Court of Appeals for the District of Columbia Circuit. That court affirmed the deportation order, rejecting petitioner's assertion that the underlying evidence was tainted and other procedural objections. In a dissenting opinion, Judge Wright found that petitioner's statement "was the fruit of an illegal seizure of petitioner's person, and should not have been admitted" (Pet. 26).

## ARGUMENT

1. The major thrust of the petition is that petitioner's affidavit admitting illegal entry was the fruit of an illegal arrest and thus was inadmissible. There is no contention that the affidavit was coerced or otherwise involuntary. Nor is there any contention that petitioner was not fully and seasonably apprised of his right to remain silent and to be represented by counsel. Indeed, as the dissenting judge below noted (Pet. 25), respondent has voluntarily adopted the standards of *Miranda* v. *Arizona*, 384 U.S. 436, in interrogating persons held under official restraint. See 1 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed.) § 5.2b (1968 Cum. Supp.). It is quite clear that the full *Miranda* warning was given to petitioner before his statement was taken, and was set forth verbatim in his affidavit (Tr. Ex. 2; Pet. 16, 25). In these circumstances, in our view, the effect of any illegality in the arrest became so attenuated with respect to the statement that the rule of exclusion as a "fruit of the poisonous tree" would not apply. Cf. *Wong Sun* v. *United States*, 371 U.S. 471.

In any event, petitioner's charge of illegal arrest is ill founded. It rests primarily on his assertion that he was arrested when the officers "surrounded" his restaurant and one of them entered to interrogate persons who were inside. The officers concededly had no information concerning the presence of illegal aliens in the restaurant, the identity of petitioner, or the fact that he was in the restaurant and was illegally in the United States. Thus, there was no probable cause upon which a valid arrest could have been made.

But the very absence of information about or focus upon any particular person makes it clear that no "arrest" was being made. It is clear that immigration officers have authority to enter a public place, like a restaurant, to conduct interrogations there. 8 U.S.C. 1357(a)(1); *Amaya* v. *United States,* 247 F. 2d 947 (C.A. 9), certiorari denied, 355 U.S. 916. A noncustodial interrogation in such a public place is not an arrest or an unlawful restraint. *Green* v. *United States,* 259 F. 2d 180 (C.A.D.C.), certiorari denied, 359 U.S. 917. It was proper for immigration officers to conduct such interrogations in restaurants, on the basis of their experience that illegal aliens often are found employed in such establishments. See *United States* v. *Montez-Hernandez,* 291 F. Supp. 712 (E.D. Cal.); *Taylor* v. *Fine,* 115 F. Supp. 68 (S.D. Cal.). That same experience may have made it seem advisable to station other officers at the exits from the restaurant, since any illegal aliens actually present there might have tried to depart once the interrogating officer announced his authority and purpose. Compare *Wong Sun, supra,* 371 U.S. at 481–483.

No one was prevented from entering or leaving the restaurant, and petitioner was permitted to carry on his business until the officer asked him to come to the immigration office. It could hardly be contended that everyone in the restaurant, customers and employees alike, was under arrest after the officers appeared. As the court below noted, there is nothing in the record to show that petitioner was aware of the of-

ficers outside the restaurant.[2] Nor does the record show that the immigration officer advised petitioner, or gave him any indication, that he was under arrest or otherwise under restraint. See Tr. 7, 11, 12. On the contrary, the officer merely tried to question petitioner, who responded freely but unintelligibly, and waited in the restaurant until the arrival of petitioner's friend, who would interpret for him.

The dissenting judge below apparently recognized the difficulty in characterizing the officers' visit to the restaurant as an arrest, and he described it as "an illegal seizure of petitioner's person" (Pet. 26), as "limited custody" (Pet. 29), and as "detention of an individual for interrogation" (Pet. 33). We do not think the use of such characterizations advances petitioner's claim. Nor do we find any relevance in the reliance of petitioner and the dissenting judge below on this Court's decisions in the "stop and frisk" cases, *Terry* v. *Ohio,* 392 U.S. 1, and *Sibron* v. *New York,* 392 U.S. 40. The forcible seizure and search of

[2] Petitioner's objection to this observation on the ground that it constitutes a factual finding outside the record misconceives the court's statement. Petitioner was attempting to show that an arrest had taken place. The court's observation that knowledge of the restraint on the part of the person involved is inherent in the concept of arrest was an accurate statement of legal principle. Since petitioner remained mute, and the record does not show that he was aware of any restraint, and indeed not show that petitioner was aware of any restraint, and indeed appears to show the contrary, the court correctly found that petitioner had failed to substantiate his thesis that he had been arrested.

the persons in those cases obviously required a showing of reasonable suspicion. Here, on the other hand, there was a form of questioning, specifically authorized by statute and closely analogous to a police officer's license check of a motorist, or a border inquiry by customs officers. Such interrogation, reasonably carried out as it was here, is not subject to the requirements of probable cause.[3]

2. Petitioner alternatively contends that an improper arrest occurred when the immigration officers asked him to accompany them to their office. Section 287(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(2), authorizes arrest without warrant of any alien if the immigration officer has reason to believe the arrested person is an alien in the United States illegally and is likely to escape before a warrant can be obtained for his arrest. Petitioner contends that the officers lacked such probable cause.

[3] We do not accept the theory of the dissenting judge below that the words "without warrant" in the introductory portion of Section 287 mean that the statutory grant of authority to conduct interrogations contemplated "some form of search or seizure as an adjunct to such questioning" (Pet. 28). This supposition is unsupported by legislative history or administrative practice or interpretation. Section 287 contains other provisions conferring authority for arrest and search. The introductory language covers all such provisions. To the extent that it relates to the authority to interrogate, it emphasizes congressional awareness of the importance of interrogation, rather than circumscribes officers' authority. Few violators of immigration laws could be detected if probable cause was required, since such persons generally lead quiet, anonymous lives.

The court below correctly found the officers' action supported by probable cause. They confronted a person unable to speak English who produced conflicting documents in the names of two different individuals who had been involved in deportation proceedings. Such circumstances gave a reasonable basis for the belief, later confirmed, that the person interrogated was unlawfully in the United States. On the basis of the information then available to them, the officers had a reasonable basis for their conclusion that the suspected person would flee before a warrant could be obtained.

3. Even without the challenged statement, the deportation order is supported by solid extrinsic evidence—petitioner's immigration records, Exhibits 3 and 4. These records show his prior deportation in 1965, his failure to obtain permission to reenter following deportation (as required by Section 212(a)(17) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(17)), and the denial of shore leave at Philadelphia in 1966; they also include a Hong Kong Seaman's Identification Book in his name issued early in 1966. This evidence, coupled with petitioner's silence and the statutory presumption of unlawful entry evoked by his failure to show the time, place, and manner of his entry into the United States (Sec. 291, Immigration and Nationality Act, 8 U.S.C. 1361), amply met the applicable evidentiary requirements, see *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276, and leave no reason to doubt that the same result would have been reached had the statement been excluded.

4. Petitioner's complaint of a variance between the factual allegation in the order to show cause, that he reentered the United States at Philadelphia, Pa., on September 20, 1966, and the proof that he reentered at New York N.Y., on September 26, 1966, raises no issue meriting review in this Court. The charge itself alleged only that he had entered the United States in violation of law. All that the government was required to do was to establish that petitioner had entered the United States subsequent to his deportation without permission to reapply for admission; any such entry constitutes grounds for deportation, 8 U.S.C. 1182(a)(17), 1251(a)(2), irrespective of the place and date on which it is accomplished. Neither the Special Inquiry Officer nor the Board of Immigration Appeals made any more specific finding. Moreover, the order to show cause could be corrected administratively, as indeed it was in another respect at the conclusion of the administrative hearing. The absence of any prejudice to petitioner is shown by his waiver at that time of a proferred adjournment, as well as his failure at any time to deny or respond to the facts shown by the government's case. Any remand would be simply a ritual, necessarily leading to the conclusion that petitioner was deportable.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

WILL R. WILSON,
*Assistant Attorney General.*

CHARLES GORDON,
*General Counsel,*
*Immigration and Naturalization Service.*

SEPTEMBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969